(2)

92-5579

No. 92 -

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

WILBURN DOBBS,

Petitioner-Appellant,

v.

WALTER D. ZANT, Warden,

Respondent-Appellee.

Supreme Court, U.S.
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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APEALS
FOR THE ELEVENTH CIRCUIT

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56 pp

QUESTIONS PRESENTED

1. When a Petitioner who is under a sentence of death proves that racial prejudice was a factor in his case, does this Court's decision in McCleskey v. Kemp require proof that the racial prejudice actually affected the jury's decision to impose the death penalty?

2. In light of the fact that the State of Georgia affirmatively misled the State and Federal Courts by asserting that the penalty phase of Petitioner's trial had not been reported, should the District Court and Court of Appeals have allowed the actual transcript of the Petitioner's penalty phase into the record once the transcript was discovered during the course of Petitioner's initial Federal Habeas Corpus proceeding, particularly where, as here, the penalty phase transcript demonstrated that the Petitioner received ineffective assistance of counsel during the sentencing phase of his trial?

3. Is the transcript of the penalty phase of Petitioner's death penalty trial such a fundamental part of the record that it must be allowed into the record where, as here, the transcript is relevant to a claim of constitutional error and is essential to determining the truth of what occurred at Petitioner's trial?

4. Must the transcript of the sentencing phase of Petitioner's trial be allowed into the record in light of the Court's recent jurisprudence which favors a single federal habeas corpus proceeding and in light of the State's misconduct in

misleading the federal courts as to the existence of the transcript?

5. Given the facts surrounding the State's concealment of the sentencing phase transcript, do the doctrines of "exhaustion" or "law of the case" prevent the lower courts from reconsidering Petitioner's claim of ineffective assistance of counsel at sentencing during his initial petition for federal habeas corpus review?

6. Are the jury instructions in the present case, which inform the jury (1) that there are "no standards" to guide them in their decision between life and death, (2) that they have "absolute discretion" to impose the death penalty and (3) that the "only standard, if any" that the jury would be allowed to consider in making its decision between life and death is the existence of a statutory aggravating circumstance, unconstitutionally inconsistent with the Court's death penalty jurisprudence?

7. Is it essential that a jury in a capital sentencing proceeding be informed that it must consider mitigating circumstances or is it sufficient that the jury not be prohibited from such consideration?

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WILBURN DOBBS,

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WALTER D. ZANT, Warden,

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner Wilburn Dobbs respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

CITATIONS TO OPINIONS BELOW

The District Court originally entered a judgment in Petitioner's favor on January 13, 1984. The Court of Appeals reversed the grant of relief and remanded the case to the District Court for consideration of sentencing phase claims on which it had reserved decision. Dobbs v. Kemp, 790 F.2d 1499 (11th Cir. 1986), modified, 809 F.2d 750 (1987), cert. denied, 481 U.S. 1059 (1987). The District Court's initial decision is

attached hereto as Appendix A. The Circuit Court decision is attached hereto as Appendix B.

Upon remand the District Court denied relief on the reserved issues on August 9, 1989. This decision is reported as Dobbs v. Zant, 720 F.Supp. 1566 (N.D. Ga. 1989) and is attached hereto as Appendix C.

On October 11, 1989, during a District Court authorized search of the superior court reporter's storage building, Petitioner's counsel discovered the stenographic notes of Petitioner's penalty phase hearing. Noting that post-judgment motions were already pending in the District Court, Petitioner filed a Motion to Expand the Record, a Motion for Leave to Amend his Petition and a Motion to Reopen and Reconsider certain issues, including ineffective assistance of counsel at the penalty phase, pursuant to Federal Rules of Civil Procedure 59 and 60. On March 6, 1990, the District Court denied all post-judgment motions. A copy of the District Court Order is attached and cited as Appendix D.

On appeal to the Court of Appeals, Petitioner filed a Motion to Expand the Record to include the penalty phase transcript and a Motion for Limited Remand for consideration of Petitioner's claims in light of the penalty phase transcript. These motions were denied by the Circuit Court on September 12, 1990. Copies of the Circuit Court Orders denying these motions are attached as Appendix E.

A panel of the Court of Appeals affirmed the District Court's denial of relief on October 25, 1991. Upon Petitioner's filing of a Motion for Rehearing and Suggestion for Rehearing En Banc, the panel opinion was withdrawn. On June 4, 1992, the panel issued a "corrected" opinion affirming the District Court judgment and denying Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc. Dobbs. v. Zant, ___ F.2d ___ (11th Cir., June 4, 1992). This opinion is attached and cited as Appendix F (Slip op., Page No. 2791).

JURISDICTION

The judgment of the Court of Appeals was entered on June 4, 1992. The Court of Appeals stayed its mandate to and including August 3, 1992, pending the timely filing of a petition for writ of certiorari. A copy of that Order is annexed as Appendix G. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> (N)or shall cruel and unusual punishments (be) inflicted;

the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a...trial, by an impartial jury...and to have assistance of counsel for his defense;

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> (N)or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts, which provides in pertinent part:

> The Answer shall indicate what transcripts (of pre-trial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished and also what proceedings have been recorded and not transcribed...The court on its own motion or upon request of the Petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the nontranscribed proceedings be transcribed and furnished.

This case also involves the following statutory provisions, the text of which are set forth in Appendix K; Georgia Code Annotated Section 5-6-41(d), Section 17-10-130(b) and Section 17-10-35(a).

STATEMENT OF THE CASE

A. RACIAL DISCRIMINATION AND THE UNITED STATES CONSTITUTION.

1. The Historical Setting.

At the time the United States Constitution was adopted in 1789, the State of Georgia had accepted slavery as an institution and soon thereafter enacted criminal laws which prescribed different penalties for criminal offenders depending upon their race and the race of their victim.[1]

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[1] See generally, The Code of the State of Georgia (R.Clark, T. Cobb & D. Irwin, compilers 1861).

As Chief Justice Taney stated in the Dred Scott case, prior to the Civil War African-Americans were:

> ...regarded as being of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to accept...This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion. Scott v. Sanford, 60 U.S. (19 How.) 393, 407 (1857).

While the end of the Civil War freed African-Americans from slavery, it also brought forth a resurgence of legally sanctioned discriminatory treatment of African-Americans in the penal codes throughout the South. See, Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873).

Despite the passage of the Fourteenth Amendment, de jure discrimination in state criminal statutes continued to co-exist with the segregationist codes of the South such that:

> ...we...cannot deny, 114 years after the close of the War Between the States and nearly 100 years after Strauder [v. West Virginia, supra,] racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious. Rose v. Mitchell, 443 U.S. 545, 558-59 (1979).

2. Racism And The Death Penalty In Georgia.

Race as a factor in our criminal justice system has remained particularly persistent in the area of capital punishment. In 1972, the Court held that America's capital punishment statutes,

though fair on their face, were in practice so pervasively infected with racial bias that the death sentence was "wantonly and ... freakishly imposed" against African-American defendants. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Stewart, J., concurring). Troubled by the arbitrary and capricious nature in which racism was allowed to infect capital sentencing decisions, Furman struck down the death penalty statute of Georgia and every other state that then imposed the death penalty. 408 U.S. at 249 (Douglas, J., concurring); 408 U.S. at 309-10 (Stewart, J., concurring); 408 U.S. at 364 (Marshall, J., concurring).

When Georgia's post-Furman statute subsequently came before the Court for review in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2902, 49 L.Ed.2d 859 (1976), the Court affirmed its holding in Furman that:

> ...[b]ecause of [its] uniqueness...the death penalty [may] not be imposed under sentencing procedures that create a substantial risk that it [will]...be inflicted in an arbitrary and capricious manner. 428 U.S. at 188.

In Gregg, supra, however, the Court upheld Georgia's statute because the procedural safeguards provided therein "seem to satisfy the concerns of Furman" that the death penalty not be systematically applied in an arbitrary and capricious manner. Id., at 198.

The Court next addressed the issue of race, the Georgia statute, and the requirement that criminal defendants not be

sentenced to death arbitrarily or capriciously in McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

In reaffirming its commitment "to eradicate racial prejudice from our criminal justice system", the Court held that the Eighth Amendment protected a capital defendant from an unacceptable risk of racial prejudice in his sentencing hearing. McCleskey, supra, 107 S.Ct. at 1775. The Court, however, found that since McCleskey's proof was based upon statistics, McCleskey failed to demonstrate that race was a factor in his particular case. Id., at 1767.

The Court, therefore, did not answer the question, **"At what point does the evidence of racial prejudice become sufficient to prove that the risk of racial prejudice is constitutionally unacceptable when race is a factor in a particular capital case?"**

In Mr. Dobbs' case, one involving an interracial offense in a rural Georgia county, the record reveals, and the lower courts have found, the existence of racial prejudice during his capital trial. Petitioner's case raises the precise question which was raised by the Court in McCleskey but left unanswered. If the goal is to identify and eliminate race as a factor in our criminal justice system, that question should be answered now.

3. Petitioner's Evidence: The Racism of the Community, The Jurors, The Defense Attorney and the Trial Judge.

This case presents a unique picture of racial prejudice influencing the decision to impose the death penalty in a Georgia murder case.

On May 22, 1974, Wilburn Dobbs, an African-American man, was convicted of robbery, assault and murder arising from the robbery of a grocery store run by Roy Sizemore, a white man, in rural Walker County, Georgia. Mr. Dobbs was sentenced to death (TT - 501, 519-520).[2] The offense occurred in a small segregated community in Walker County, Georgia, with a 96% white population and a history of Ku Klux Klan activity (PEN 15-17, 22, 42).

The District Court found that at the time of Petitioner's trial in 1974, race relations were on the minds of the citizens of Walker County. Significantly, the District Court also found that "Walker County's history of racial segregation appears to have had some influence on the values of...the jurors..." Dobbs, supra, 720 F.Supp. at 1578.

The District Court and the Court of Appeals found that all of the jurors in Mr. Dobbs' case possessed "some racial prejudice, some more so than others..." Dobbs v. Zant, 720 F.Supp. 1566, 1579 (1990); Dobbs v. Zant, ___ F.2d ___ (11th Cir., June 4, 1992) Slip op., p. 2795.

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[2] The record in the instant case is confusing in that the trial transcript has been supplemented on several occasions resulting in a repetition of certain page numbers.
Citations to the record will be as follows:
Record Volume: tab:page
Trial Transcript (TT): page
Petitioner's Exhibit Number (PEN): page
Respondent's Exhibit Number (REN):page
Trial Transcript Voir Dire (TTVD): page
Trial Transcript Prosecutor's Guilt Close (TTPGC): page
Trial Transcript Sentencing Close (TTSC): page
First Supplemental Record (FSR): page
Federal Habeas Evidentiary Hearing (FHC): page

The District Court and the Court of Appeals found that Mr. Dobbs' court-appointed trial attorney "expressed beliefs, often in pointed ways, that blacks in general are inferior to whites morally and intellectually," and referred to Mr. Dobbs in front of the jury as "colored" and "colored boy." Dobbs, supra, 720 F.Supp. at 1578; Slip op., p. 2795-96.

The District Court and the Court of Appeals found that the trial judge also referred to the Petitioner during his trial as "colored" and "colored boy." Dobbs, supra, 720 F.Supp. at 1577; Slip op., p. 2795.

In fact, during Mr. Dobbs' trial, Mr. Dobbs and other African-Americans were referred to as "colored," "coloreds," "colored boys," "boys," "this boy" and "this" by the trial judge, the district attorney and Mr. Dobbs' court-appointed trial attorney (TTVD-39-61, 64, TT-96, 98, 110, 111, 112, 135, 141, 144, 170, 173, 181, 189, 223, 224, 292, 300, 301, 330, 333, 356, 363, 369, 374 and 375).

Concerning the effect of these references, the District Court stated:

> Further, the references at trial to Dobbs as "colored" may have had an influence on the jury's view of Dobbs as an individual. Although "colored" may have been an acceptable term when the judge and the attorney were growing up, their continued use, especially in a courtroom setting evinces a degree of insensitivity to black concerns. Id., at 1578.

The evidence developed by the Petitioner regarding the trial jurors, the court-appointed trial attorney and the trial judge is disturbing.

Two of the jurors on Mr. Dobbs' jury used the word "nigger" on occasion and one juror considered the word "nigger" a slang word and "not a bad word." Dobbs, supra, 720 F.Supp. at 1576.

Many of the jurors used the word "colored" in describing African-Americans and believed "that the races should mix to a limited extent only." Id. at 1578. One juror remarked:

> I just don't think the races should mix. I think they have just as much right to do things they are qualified to do and what they want to do as the white people, but I just don't think the races should mix. (PEN 6-27).

Another juror stated:

> Really, as a Christian, I believe in blacks marrying blacks and whites marrying whites. (PEN 3-22).

The District Court found that all of the jurors had "reservations about interracial dating and marriage." Dobbs, supra, 720 F.Supp. at 1525. According to one juror, her daughter could not date an African-American man because her daughter "would not have dared brought one home," and if she did, "I just wouldn't have allowed it. I just wouldn't -- they just wouldn't be welcomed, that's all." (PEN 7-18).

Two of the jurors feared African-Americans and found African-Americans to be "scarier than whites." Dobbs, supra, 720 F.Supp. at 1576, n.22. In referring to African-Americans, one juror stated:

> They may have had a little envious drive in their heart and thought they would get even

> with whites by stealing. I think that it was a lot of the problem. Trying to get even with the whites. (PEN 7-12).

Continuing, the juror added: "I would fear one on the street...I think all white women have that fear." (PEN 7-16).

The trial judge appointed an attorney to represent Mr. Dobbs who used the word "nigger" jokingly and, who, as found by the District Court, expressed beliefs "that blacks in general are inferior to whites morally and intellectually" Dobbs, supra, 720 F.Supp. at 1578.

In his deposition, Mr. Dobbs' court-appointed trial attorney made the following comments when questioned about his racial attitudes:

> For example, now, many of them are uneducated. I don't think uneducated would make good school teachers. I think most of them make good basketball players. (PEN 13-9).

> And I know if you call the State Capitol on business and get a black, you're probably going to get the wrong information. That's true if you call a lot of businesses. And my beliefs lead me to believe that when I recognized the voice of a black, I'm overly cautious to make sure that the information I am getting is correct. (PEN 13-11).

> Back when I was a kid, you'd hire a maid with the understanding, sort of understood, you'd pay her a certain amount a week, plus tote, what'd she'd walk off with, things, and nothing would be said about it. (PEN 13-16).

> I know that if you walk down the streets of Chattanooga, especially Martin Luther King, Jr. Boulevard at night, there's a good chance you're going to get robbed. (PEN 13-12).

When asked why he believed African-Americans possessed these inferior characteristics, Mr. Dobbs' court-appointed attorney sarcastically referred to his own slave-owning heritage:

> I don't have any idea. Maybe its caused by my granddaddy owning slaves.... I say that because every time something comes up about them being in trouble or disadvantaged or everything, that they themselves seem to attribute it to their prior condition of servitude. (PEN 13-38-39).

Counsel concluded by saying that "I don't think you can lay it all at the feet of slavery or something like that. It does seem that the Asians that come over here don't have the same problems as the blacks who have been here all the time...." (PEN 13-15).

During jury selection Mr. Dobbs' court-appointed attorney asked the jurors if "the fact that this man is colored (would) have any bearing whatsoever on your decision in this case?" (TTVD-64). There was no response from the jurors.

In addressing the court-appointed defense attorney's testimony, the District Court stated:

> He said that integration has led to deteriorating neighborhoods and schools, and referred to the black community in Chattanooga as "black boy jungle". He strongly implied blacks have inferior morals by relating a story about sex in a classroom...He said that blacks in Chattanooga were more troublesome than blacks in Walker County. 720 F.Supp. at 1577.

The trial judge in Mr. Dobbs' case was raised in Walker County during the era of racial segregation. Id., at 1577. From 1953 to 1963, prior to becoming a judge, he served in the Georgia House of Representatives and Georgia Senate. During his ten years in the Georgia legislature he participated with other members of the legislature in an effort to prevent racial

integration (PEN 14-29). He voted to prohibit all interracial social functions in Georgia, voted in favor of a resolution to impeach the Justices of the United States Supreme Court who decided Brown v. Board of Education, 347 U.S. 348, 74 S.Ct. 686, 98 L.Ed.2d 873 (1954), and voted in favor of a resolution to abolish the Fourteenth and Fifteenth Amendments to the United States Constitution. (PEN 14-16). In 1965, after leaving the legislature, he was elected Superior Court judge, a position he held until 1981. (PEN 14-65, 83).

During the course of Petitioner's trial, his court-appointed trial attorney admitted Mr. Dobbs' guilt during cross examination of the State's witnesses. (TT-262, 317, 318, 319, 323, 324 and 325). In spite of this, at the conclusion of the State's case, Petitioner's court-appointed attorney called him as a witness, at which time Mr. Dobbs denied his involvement in the charged offenses.

Mr. Dobbs' court-appointed trial attorney introduced no evidence during the sentencing hearing. During his closing argument at the sentencing hearing he made no argument concerning the facts of the case, no argument concerning Mr. Dobbs' background, never mentioned Mr. Dobbs by name and never asked the jury to return a life sentence. In fact, of the seven pages of argument, six pages consisted of a verbatim reading from Justice Brennan's concurrence in Furman v. Georgia where Justice Brennan argued that the death penalty was actually carried out very rarely. (Attached hereto as Appendix J).

Finally, Petitioner's expert, Dr. Alex Willingham, a social and political scientist whose expert opinion has been relied upon on prior occasion by this Court, testified that racial prejudice permeated the community of Walker County, Georgia and gave rise to an us versus them mentality amongst its citizenry. (PEN 1-28). In Dr. Willingham's opinion, which was unrebutted, race was a salient factor which affected the daily, decisionmaking processes of the citizens of Walker County. (PEN 1-23-25, 35). It was Dr. Willingham's opinion that racial prejudice in Walker County would be a particular salient factor in a capital sentencing hearing because the us versus them mentality would create a type of racial retribution where one race would try to get even if it deemed it had suffered a loss. (PEN 1-27).

After reviewing the depositions of the individual jurors in Petitioner's case, Dr. Willingham's unrebutted conclusion was that "it would be unrealistic to expect" the jurors to set aside their racial attitudes.(PEN 1-35). To the contrary, Dr. Willingham stated that the prosecutor's, defense attorney's and trial judge's disrespect for Mr. Dobbs at trial "tapped into and activated the racial attitudes among the jurors." (PEN 1-33).

Petitioner asserts that the foregoing facts evidence an unacceptable risk that racial prejudice influenced the jury's decision to impose the death penalty in his case.

4. The Opinion Of The Court Of Appeals.

In its opinion, the Court of Appeals did not dispute the Petitioner's evidence which led the lower court to conclude that

the jurors, the court-appointed defense attorney, and the trial judge were racially prejudiced and believed African-Americans to be inferior to whites.

The Court of Appeals held that the proper standard to apply to Petitioner's Eighth Amendment claim was whether there was a constitutionally unacceptable risk that racial prejudice affected the Petitioner's sentencing. In applying that standard, however, the Court denied relief because Petitioner had failed to prove "that racial considerations in fact affected the jurors' decision to impose the death penalty." (Slip op., p. 2796). As stated by the Court of Appeals:

> Dobbs contends that the potential influence of racial prejudice upon the decision makers in his case violated his eighth amendment right. In such an instance, to show that the risk of racial prejudice influencing sentencing rose to a constitutionally unacceptable level, Dobbs must show that racial prejudice actually affected the jury's decision. (Slip op., p. 2796) (Emphasis added).

In so holding, the Court of Appeals failed to cite any authority.

Petitioner respectfully submits that the decision of the Court of Appeals is in conflict with two decades of Supreme Court jurisprudence which has never required a capital defendant to prove the actual affect of racial prejudice under the Eighth Amendment.

B. THE MISSING TRANSCRIPT OF PETITIONER'S SENTENCING HEARING.

1. Introduction

Pursuant to Georgia's death penalty statute, Petitioner's capital trial was bifurcated. The first proceeding was conducted to determine Mr. Dobbs' guilt or innocence. Upon finding Mr. Dobbs guilty, a sentencing hearing was conducted to determine whether Petitioner would be sentenced to life imprisonment or death.

From the time of Petitioner's initial appeal to the Georgia Supreme Court to his motion for reconsideration before the District Court, the transcript of Petitioner's sentencing hearing remained missing with the State and the court reporter maintaining that the hearing had not been reported.

On October 11, 1989, during a court-ordered search of the court reporter's storage building, the stenotype notes from Petitioner's sentencing hearing were found. For the first time in Petitioner's case the truth about what occurred during that hearing was known. The truth conflicted with the previous testimony of Mr. Dobbs' court-appointed trial attorney. Unfortunately, rather than admitting the sentencing hearing transcript into the record, the District Court and the Court of Appeals refused to review the transcript and allowed their previous opinions, which were undisputedly based upon false testimony, to stand.

2. Petitioner's Diligence In Requesting the Sentencing Hearing Transcript And The State's Failure To Comply

Mr. Dobbs' first Notice of Appeal to the Georgia Supreme Court, filed on October 31, 1975, stated:

> The Clerk of the Court will please omit nothing from the record on appeal. The transcript of evidence and proceedings will be filed for inclusion in the record on appeal.

O.C.G.A. § 17-10-35(a) in effect as Code Annotated, Section 27-2537(a) in 1974, required the clerk of the trial court to transmit "the entire record and transcript" of a death penalty proceeding to the Supreme Court for appellate review. O.C.G.A. § 5-6-41(d) clearly mandated that all portions of the trial actually taken down be transcribed ("...it being the intention of this Article that all these matters appear in the record.").

The record on appeal to the Georgia Supreme Court was supplemented on December 8, 1975, by inclusion of the jury voir dire and the closing argument of the prosecutor during the guilt/innocence portion of the trial.

In 1979, while Petitioner was pursuing an Extraordinary Motion for New Trial in the Walker County Superior Court, Petitioner continued to seek inclusion of the sentencing phase transcript and filed a Motion for Supplemental Record with the trial court, asking for the following:

> That all portions of the record of this case which have not previously been transcribed and/or which are not currently lodged with the Supreme Court of Georgia be prepared, certified and transmitted to the Supreme Court of Georgia. (REN 9).

The transcript of the sentencing phase hearing was not produced at that time.

3. The State's Affirmative Concealment Of The Transcript Through The Submission Of False Affidavits.

Upon filing his petition for a writ of habeas corpus in the United States District Court for the Northern District of Georgia, Petitioner filed a Motion to Expand Record, pursuant to Habeas Corpus Rule 5. This motion specifically requested that the transcript of the sentencing phase of Petitioner's trial be included in the record or that an accounting of "non-transcribed" proceedings be submitted as required by Rule 5.

In its supplemental response to Petitioner's Motion, the State filed sworn affidavits from the court reporter, Mr. Dobbs' court-appointed defense attorney, and the trial judge. The affidavit of the court reporter affirmatively stated that he had reviewed his notes from Petitioner's trial and that he "did not report the closing argument given by the district attorney at the sentencing phase of the trial." The affidavit of the defense attorney stated that to the best of his knowledge and belief the court reporter "did not transcribe or report the closing arguments of either counsel made at the sentencing phase of the trial." Finally, the trial judge stated that "it was not required by law nor was it a local rule of the Court to require the reporting of closing arguments in felony cases." See Appendix H.

Without the sentencing hearing transcript, the courts relied upon the testimony of Petitioner's court-appointed trial attorney to prove what occurred during Petitioner's sentencing hearing.

Concerning his effectiveness in representing Petitioner at his sentencing hearing, trial counsel testified that he did not present any evidence in mitigation because he decided to make an argument in mitigation that the shooting was "impulsive" and that Mr. Dobbs should be sentenced to life imprisonment.

4. The District Court And The Court Of Appeals Based Their Decisions Upon The False Testimony Of Petitioner's Court-Appointed Trial Attorney.

In denying Petitioner's claim of ineffective assistance of counsel, the District Court and the Court of Appeals based their decisions on trial counsel's false testimony that he made the tactical decision not to present any evidence in mitigation because of his decision to make an argument in mitigation that the shooting was impulsive and did not warrant the death penalty.

With the discovery of the sentencing hearing transcript it is now known that trial counsel's testimony was false and that the District Court and Court of Appeals decisions are, therefore, founded upon a false record.

5. The Sentencing Hearing Transcript Reveals That Trial Counsel's Testimony Concerning The Sentencing Hearing Was False And That His Representation Was Not Only Ineffective But Affirmatively Harmful To Petitioner's Interests.

With the benefit of the transcript of the sentencing hearing we now know that trial counsel's testimony concerning his strategy and his argument was false.

Trial counsel originally testified that he argued that:

1) The slaying itself was "probably impulsive;"

2) Mr. Dobbs was "frightened and shot him in fleeing to aid the escape;"

3) Key testimony which indicated that Mr. Dobbs had attempted to harm a victim at the hospital after the shooting could not have been true;

4) Given the circumstances of this murder it was not the type of offense which merited the death penalty, and therefore;

5) Mr. Dobbs should be given a life sentence. (FHC: 70-71).

The actual transcript of the sentencing hearing reveals that:

1) Trial counsel never argued that the slaying was "probably impulsive";

2) Trial counsel never argued that Mr. Dobbs was "frightened and shot him in fleeing to aid the escape";

3) Trial counsel never argued that key testimony which indicated Mr. Dobbs had attempted to harm a victim at the hospital after the shooting could not have been true;

4) Trial counsel never argued that given the circumstances of this murder it was not the type of offense which merited the death penalty; and

5) Trial counsel never argued that Mr. Dobbs should be given a life sentence. (Appendix I).

In fact the transcript of the sentencing hearing reveals that:

1) Of the seven pages of trial counsel's closing argument, which comprised the entire defense case at sentencing, six of the pages are a verbatim reading from a concurring opinion in Furman v. Georgia; (Appendix J).

2) Trial counsel diminished the jurors' sense of responsibility by informing them that previous death penalty statutes, including Georgia's, had been found

unconstitutional by the United States Supreme Court and that Georgia's current death penalty statute would be similarly reviewed by the United States Supreme Court;

3) Trial counsel further diminished the jurors' sense of responsibility by informing them that the actual imposition of the death penalty was rare and that, in fact, no executions had been carried out in the United States in the past seven years; (TTSC:3)

4) Trial counsel never argued a single fact in mitigation about Mr. Dobbs' background;

5) Trail counsel never argued a single fact in mitigation abut the crime;

6) Trial counsel never referred to Mr. Dobbs by name (Appendix I); and

7) Trial counsel never asked the jury to return a sentence of life imprisonment.

6. The Opinion Of The Court Of Appeals

The Court of Appeals held that its prior decision concerning ineffective assistance of counsel was not reviewable because it remained the law of the case.

Additionally, the Court of Appeals affirmed the District Court's holding that:

> The issues that Dobbs wants reopened...were decided prior to the Eleventh Circuit remand. The remand order limited this Court's consideration to issues upon which this Court had reserved judgment. If Dobbs wants to present additional evidence on other issues, he must do so in a separate proceeding....
>
> (T)o the extent that the claims Dobbs wants reconsidered are based on the closing arguments of the sentencing phase, they should be heard initially in state court. (Slip op., p. 2797-2798).

The District Court also found that:

> On the other hand, the entire transcript should have been made available for Dobbs' direct appeal, and the State represented to this Court that the sentencing phase closing arguments could not be transcribed. Dobbs' position that he

legitimately relied on the State's representation is well taken. (Appendix D, p.4).

Petitioner asserts that the actual sentencing transcript is a fundamental, material and constitutionally crucial portion of the record which should be made a part of the record herein, particularly in light of its relevance to Petitioner's claim of ineffective assistance of counsel.

C. THE UNCONSTITUTIONAL PENALTY PHASE JURY INSTRUCTIONS.

At the conclusion of the sentencing hearing, Petitioner's jury was instructed regarding sentencing on all capital and non-capital counts. When the trial judge reached the murder count he gave the following instructions:

> Now I instruct you our law says in arriving at your verdict in these cases, beyond prescribing the limits which a jury can go, the law provides no standards for the guidance of the jury in the selection of the penalty but rather permits the whole matter of determining which penalty shall be fixed to the judgment, conscience, and absolute discretion of the jury.
>
> The only standard, if any, that you will be permitted to consider in arriving at whether or not you will inflict the death penalty is the question of whether or not you find beyond a reasonable doubt that this Defendant committed the offense of murder while engaged in the commission of another capital felony. (Emphasis added) (TT-513).

This instruction provided the jury with an unconstitutional statement of the law. It was particularly harmful to inform the jury that there were "no standards" to guide them in determining between life and death and that the "whole matter of determining which penalty shall be fixed (rested with) the judgment, conscience and absolute discretion of the jury." The instruction

constituted an open invitation to the influence of passion, prejudice, and arbitrariness, including the racial prejudices of the jurors who actually decided that Mr. Dobbs' should be put to death.

Further, the instruction that the "only standard, if any" that the jury would be permitted to consider in determining whether to impose the death penalty was whether the jury found the statutory aggravating circumstance, violated the Court's jurisprudence regarding consideration of mitigating circumstances.

Although the Court of Appeals referred to the trial court's mere mention of argument in mitigation prior to the penalty phase, there is absolutely no mention of mitigation, the character of the Petitioner or the facts of the offense as matters to be considered by the jury during their deliberations. The jury was never instructed to avoid the influences of passion, prejudice or other arbitrary factors.

As noted by the United States Magistrate who first considered the jury instruction:

> While the jury was told that the Petitioner's punishment was within their discretion, they were told that the only standard which they could consider concerned the existence of aggravating circumstances (RSP. Exh. 2, p. 513). A reasonable juror, upon receiving this instruction, would not have been aware of his obligation to consider mitigating circumstances in making his determination. (Magistrate's Report, August 26, 1983, p.56).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI IN ORDER TO CONSIDER WHETHER AN AFRICAN-AMERICAN UNDER A SENTENCE OF DEATH WHO CAN DEMONSTRATE THAT RACIAL PREJUDICE WAS A FACTOR IN HIS SENTENCING HEARING MUST PROVE THAT RACIAL PREJUDICE "ACTUALLY AFFECTED" THE JURORS DECISION TO IMPOSE THE DEATH PENALTY.

This Court's post-Civil War jurisprudence has been marked by a commitment to identify and eliminate the effects of racial prejudice in our criminal justice system. See, Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); Wayte v. United States, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985); Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); Neal v. Delaware, 103 U.S. (Otto) 370, 26 L.Ed. 567 (1881); Ex Parte Virginia, 100 U.S. (10 Otto) 339, 25 L.Ed. 676 (1880).

The Court has been particularly vigilant in this endeavor when the State seeks to execute an African-American and entrusts a jury with the discretion to decide whether that person should live or die. In addressing this issue the Court stated that:

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected...[A] juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether Petitioner's crime involved the aggravating factor specified under Virginia law....More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks which could easily be stirred up by the violent facts of Petitioner's crime, might incline a juror to favor the death penalty.
>
> The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence...We have

> struck down capital sentences when we found that the circumstances under which they were imposed "created an unacceptable risk that 'the death penalty (may have been) meted out arbitrarily or capriciously' or through 'whim...or mistake' Turner v. Murray, 476 U.S. 28, 35-36, 106 S.Ct. 1683, 1687-88, 90 L.Ed.2d 27: citing Caldwell v. Mississippi, 472 U.S. 320, 343, 105 S.Ct. 2633, 2647, 86 L.Ed.2d 231 (1985) (O'Conner, J. concurring in part and concurring in judgment).

Historically, the Court's jurisprudence has evaluated the issue of racial prejudice, discretion and the death penalty under the Eighth Amendment within the context of Georgia's death penalty statute. See, Furman, supra, Gregg, supra, McCleskey, supra.

At no time has that jurisprudence required a defendant to prove under the Eighth Amendment that racial prejudice actually affected the juror's decision to impose the death penalty. To the contrary, the Court has historically evaluated the issue in terms of risk.

In Furman, supra, the Court did not find that racial prejudice actually affected jurors' decisions to impose the death penalty. In fact, Justice Douglas referred to the impossible "task...[of] divin[ing] what motives impelled these death penalties." 408 U.S. at 253.

In Gregg, supra, the Court, in reaffirming its intolerance for racism in the capital sentencing process stated that "the death penalty [may] not be imposed under sentencing procedures that create a substantial risk that it [will]...be inflicted in an arbitrary and capricious manner." Gregg, supra, at 188. (Emphasis added).

In reaffirming its commitment "to eradicate racial prejudice from our criminal justice system" the Court held that the Eighth Amendment protected a capital defendant from a "constitutionally unacceptable risk" of racial prejudice in his sentencing hearing. McCleskey, supra, 107 S.Ct. at 1775 (Emphasis added).[3]

Relief was denied in McCleskey under the Eighth Amendment, however, because there was no evidence "that race was a factor in McCleskey's particular case." Id.

There can be no doubt that race was a factor in Mr. Dobbs' sentencing hearing. The Petitioner has demonstrated that, and the lower courts have found that, in his particular case, the community in which he was sentenced, the jurors who sentenced him to death, the defense attorney who represented him at the sentencing hearing and the trial judge who presided over his sentencing hearing were all racially prejudiced.

The Court of Appeals held, however, that said proof was insufficient because the Petitioner "must show that racial

[3] The Court's traditional emphasis on "risk" in evaluating a claim of racial prejudice under the Eighth Amendment has always been clearly distinguished from the specific intent standard required under the Fourteenth Amendment. McCleskey reaffirmed the Court's long-held adherence to the differing standards under the Fourteenth Amendment and the Eighth Amendment. Under the Fourteenth Amendment, the Court addressed the issue in terms of "purposeful discrimination" and, "discriminatory effect". McCleskey, supra, 107 S.Ct. at 1755, citing Wayte v. United States, 470 U.S. 598, 608, 105 S.Ct. 15242, 1531, 84 L.Ed.2d 547 (1985). With respect to the Eighth Amendment claim the Court addressed the issue in terms of "risk". McCleskey, supra, 107 S.Ct. at 1775.

prejudice actually affected the jury's decision." (Appendix F, Slip op., p. 2796).

This extraordinary requirement is contrary to the Court's prior jurisprudence concerning racial prejudice, the death penalty and the Eighth Amendment.[4]

The Court has always "acknowledged the difficulty of divining the jury's motivation in an individual case", McCleskey supra. at 1783 (Brennan, J., dissent). Thus, it is imperative, when evaluating the influence of racial prejudice that a court not rely upon broad, subjective denials of racial prejudice, but that it analyze objective indicia which are suggestive of racial prejudice. Casteneda v. Partida, 430 U.S. 482, 498 n.19 97 S.Ct. 1272, 1282, 57 L.Ed.2d 498 (1977); Alexander v. Louisiana, 405 U.S. 625, 632, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972).

The Court has also always required a heightened level of scrutiny for racial concerns in the context of a death penalty case. In Turner v. Murray, supra, the Court acknowledged that capital sentencing proceedings are uniquely vulnerable to the infection of racial prejudice: "We are convinced that such [sentencing] discretion gives greater opportunity for racial prejudice to operate than is present when the jury is restricted to fact finding." Id., 106 S.Ct. at 1088, n.8.

[4] The extraordinary nature of this requirement is obvious in that no juror will admit to sentencing a defendant to death because the defendant was an African-American. Even if a juror were inclined to so testify, arguably Federal Rule of Evidence 606(b) would prohibit the inquiry as an invasion of the deliberative process of the juror.

The decision by the Court of Appeals has ignored this Court's precedent concerning race. By evaluating racial prejudice in terms of actual affect rather than risk, the Court of Appeals not only failed to follow the historical progression of Furman, Gregg and McCleskey, but also ignored well-established jurisprudence which has traditionally been based upon "risk" and has not required a movant to prove that an improper extraneous factor "actually affected" the jury's decision.

In United States v. United States Gypsum Company, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 895 (1978), the Court did not require the defendant to prove that the ex parte meeting between the trial judge and the jury foreman actually affected the juror's deliberations. The Court reversed the defendant's convictions based upon a risk of affect.

In Parker v. Gladden, 385 U.S. 363, 365, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966), the Court did not require the defendant to prove that the statements from a bailiff to certain jurors affected the juror's deliberations. The Court reversed the defendant's conviction based upon the "probability that prejudice will result."

In Sheppard v. Maxwell, 384 U.S,. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), the Court did not require the defendant to prove the actual affect of the pre-trial publicity on the jurors. The defendant's conviction was reversed because of the likelihood that said publicity was prejudicial.

In Remmer v. United States, 350 U.S. 377, 382, 76 S.Ct. 425, 100 L.Ed.2d 435 (1956), the Court did not require the defendant to prove actual affect of an outsider's conversation with a juror concerning the case. The Court reversed the defendant's conviction because the conversation "may have influenced" the jurors.

While the actual affect of any extraneous factor is inherently difficult to quantify within our system of criminal justice, there can be no doubt that the effect of racial prejudice may be the most difficult. By requiring Petitioner to prove that the jurors' subjective intent led them to purposely discriminate against the Petitioner and sentence him to death because he was an African-American, the Court of Appeals has required the Petitioner to do what realistically cannot be done, and has, in effect, accepted the racial prejudice in Petitioner's case. The Court of Appeals cited no authority and provided no analysis to justify such a requirement. This Court should not allow such a ruling to stand and should grant certiorari.

II. THE COURT SHOULD GRANT CERTIORARI TO ADDRESS THE ADMISSIBILITY OF THE SENTENCING HEARING TRANSCRIPTS INTO THE FEDERAL COURT RECORD AND TO CLARIFY THE DEVELOPING HABEAS CORPUS JURISPRUDENCE FAVORING A SINGLE PETITION, FINALITY AND JUDICIAL ECONOMY.

The discovery of Petitioner's sentencing hearing transcript, which resulted from a court-authorized search of the court reporter's storage room, proved that the record upon which the instant case had previously been decided was false.

Petitioner sought the sentencing hearing transcript from day one: in his original notice of appeal, through inquiry to the court reporter, with a motion in state court and in a motion to the District Court pursuant to Habeas Corpus Rule 5, after the State failed to include the transcript with its original Answer or make an accounting for the absence of the transcript.

In response to the motion in District Court, the State filed the affidavits of the court reporter, Petitioner's court-appointed defense attorney and the trial judge. The three affidavits asserted that the sentencing hearing had not been reported. (Appendix H, Attachments "1", "2" and "3"). This was not true.

In denying the Petitioner's Motion to Supplement the Record with the actual sentencing hearing transcript, the District Court stated:

> ...the entire transcript should have been made available for Dobbs' direct appeal, and the State represented to this Court that the sentencing phase closing arguments could not be transcribed. Dobbs' position that he legitimately relied on the State's representation is well taken. (Appendix D, p.4)
>
> Continuing, the District Court stated:
>
> In weighing the interests of comity and federalism, the Court finds that, to the extent that the claims Dobbs wants reconsidered are based on the closing arguments at the sentencing phase, they should be heard initially in the state court. (Appendix D, p.4).

On appeal, Petitioner filed a motion to supplement the record on appeal with the sentencing hearing transcript, together with a Motion for Limited Remand, which requested that the District Court be ordered to reopen and reconsider certain

issues, including Petitioner's claim of ineffective assistance of counsel during the sentencing phase. The Court of Appeals denied these motions and the actual transcript of the sentencing hearing has never been allowed into the record.

The Petitioner's request that his sentence of death be reviewed upon the true record can only be described as fundamental and elementary. Gardner v. Florida, 430 U.S. 349, 359, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1978).

This Court's jurisprudence, particularly its most recent jurisprudence, as well as the interests of fairness, finality and judicial economy mandate that the sentencing hearing transcript be allowed into the record herein and that Petitioner's ineffective assistance of counsel claim be reconsidered in light of the true record.

1. The Integrity Of The Writ Of Habeas Corpus Demands That The State Not Benefit For Its Misconduct By Forcing Petitioner Into A Successor Writ Position

This Court's recent jurisprudence concerning federal habeas corpus has focused on the need for litigating all claims in the initial habeas corpus proceeding and has established increasingly stringent procedural rules in the path of a successor writ. See, Sawyer v. Whitley. ___ U.S. ___ (1992); Keeney v. Tamayo-Reyes, ___ U.S. ___ (1992); Coleman v. Thompson, 501 U.S. ___ (1991); McCleskey v. Zant, 499 U.S. ___ (1991); Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); Murray v. Carrier,

477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); Smith v. Murray, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986).

As the Court recently stated in Sawyer:

> Unless a habeas petitioner shows cause and prejudice, a court may not reach the merits of: (a) successive claims which raise grounds identical to grounds heard and decided on the merits in a previous petition, (b) new claims, not previously raised which constitute an abuse of the writ, or (c) procedurally defaulted claims in which the petitioner failed to follow applicable state procedural rules in raising the claims. 60 USLW at 4657[5] (Emphasis in original). The heightened procedural requirements are founded upon an emphasis on the heavy burden of scarce judicial resources and "the State's interest in channeling the resolution of claims to the most appropriate forum, in finality, and in having an opportunity to correct its own errors". Keeney v. Tamayo-Reyes, 60 USLW 4339, 4341 (1992)(citations omitted).

In the case at bar, the policy goals of judicial economy and finality would be promoted by granting Petitioner a federal review of his original habeas corpus claims based upon the true and complete record in his case. Petitioner should not have to file a successive petition which raises claims which were raised in his initial petition in order to have those claims reviewed based upon the true and complete record in his case.

The only reason Petitioner is in this position is because the State failed to meet its statutory obligation to produce a full record of the trial proceedings in Petitioner's case and

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[5] In the context of a capital case, the lone exception to the rule is Petitioner's ability to prove "actual innocence" as to the aggravating factors alleged at trial which allowed him to be "death eligible". This is an extremely difficult standard to meet. See Sawyer v. Whitley, ___ U.S. ___, 60 USLW 4655 (1992).

then affirmatively concealed the sentencing hearing transcript by submitting false affidavits in federal court.

A State's efforts to conceal its misconduct precludes the consequences of said misconduct from constituting a procedural bar to a habeas corpus petitioner. Amadeo v. Zant, 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988).

Considering the facts of the instant case, the transcript of Petitioner's sentencing hearing should be allowed in the record and the Petitioner's claim of ineffective assistance of counsel should be reviewed based upon that transcript. To do otherwise would reward the State for its misconduct, prejudice the Petitioner and would be contrary to recent decisions of this Court which have emphasized the importance of the litigation of all issues in a litigant's initial federal habeas corpus proceeding.

2. The Sentencing Phase Transcript Is A Fundamental And Necessary Part of the Record.

In Gardner v. Florida, 430 U.S.349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) the Court emphasized the constitutional requirement of a full appellate record:

> ...it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia, supra, 430 U.S. at 362, 97 S.Ct. at 1206.

Federal Habeas Corpus Rule 5 anticipates the inclusion of the entire trial transcript in the record for federal review.

"The obligation to come forward with the state court record is squarely upon the Respondent, not the Petitioner." Bundy v. Wainwright, 808 F.2d 1410, 1415 (11th Cir. 1987). The Respondent in the instant case failed to meet that obligation and instead affirmatively misled the federal courts by submitting false affidavits alleging that the sentencing hearing was not reported.

The transcript of Petitioner's sentencing hearing is of fundamental importance to a fair review of Petitioner's sentence of death. See, Gregg v. Georgia, supra, at 167, 96 S.Ct. at 2922; where the Court notes the fundamental importance of review of the "complete record."

It is of such fundamental importance that where, as here, the transcript is material to an issue before the federal court, it must be made a part of the record.

3. Exhaustion Is Not The Issue

The District Court and the Court of Appeals held that the state courts must first review any issue involving the sentencing phase transcript as a matter of exhaustion.

Exhaustion is not the issue for two reasons.

First, the issue of ineffective assistance of counsel was previously raised and decided in state court. It has been exhausted. There is no question that neither the character nor the nature of the claim has changed so much as to render the claim unexhausted. See, Vasquez v. Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986).

Second, it is the State's fault that the sentencing hearing transcript was not previously revealed to the state or federal courts and, now, the lower courts have issued opinions concerning ineffective assistance of counsel which were based upon a false record. The State submitted false affidavits to the District Court in response to its obligation under Habeas Corpus Rule 5 concerning the existence of the sentencing hearing transcript. It is a uniquely federal question that, as a result of the State's conduct, both the District Court and the Court of Appeals have issued opinions based upon a false record.

The Eighth Circuit was faced with a similar situation in Walker v. Lockhart, 763 F.2d 942 (8th Cir. 1985) (en banc) cert. denied, 478 U.S. 1020, 106 S.Ct. 3332, 92 L.Ed.2d 738 (1986). In that case the Circuit Court took appropriate action when it discovered that it had been misled by the State's evidentiary representations. The Eighth Circuit withdrew its mandate and ordered the District Court to grant relief based upon the true facts of the case. Such action is appropriate in Petitioner's case.

4. Law Of The Case Is Not The Issue

Having rendered a previous opinion in Petitioner's case, prior to the discovery of the sentencing hearing transcript, the Court of Appeals held that its previous opinion constituted the law of the case and therefore precluded further review based upon the sentencing hearing transcript.

In the context of the instant death penalty habeas corpus action, reliance upon the law of the case doctrine with respect to Petitioner's claim of ineffective assistance of counsel at sentencing is misplaced.

In Standard Oil Co. of California v. United States, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976), the Court ruled that a District Court could entertain a Rule 60(b) motion without leave of the higher court even though the issue asserted had been affirmed in an earlier decision. The Court noted that the federal district courts are perfectly capable of ferreting out frivolous motions and that it would be a waste of judicial resources to require appellate court approval to reconsider or reopen a district court decision which had been affirmed on appeal.

Additionally, this Court has recognized that the doctrines of res judicata and "law of the case" are not inexorable commands and that justice must be the ultimate objective. See, Wright v. West, ___ U.S. ___ (decided June 19, 1992, Slip op., p. 8, n.3), Liljeberg v. Health Sources, Corp., 486 U.S. 847, 100 S.Ct. 2194, 100 L.Ed.2d 855, 874 (1988), Klapprott v. United States, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed.2d 266 (1949), Standard Oil Co. of California v. United States, supra.

Justice in the instant case is allowing the sentencing hearing transcript in the record and reviewing Petitioner's claim of ineffective assistance of counsel based upon what actually happened at his sentencing hearing.

5. The Integrity Of The Federal Courts Demands That The False Record Upon Which The Holding In Dobbs V. Zant, 790 F.2d 1499 (11th Cir. 1987) Is Founded Be Corrected.

The previous rulings by the District Court and the Court of Appeals concerning Petitioner's claim of ineffective assistance of counsel at sentencing are based upon facts which are known to be false. Admission of the sentencing hearing transcript into the record will allow a review of Petitioner's claim of ineffective assistance of counsel at sentencing to finally be based upon what actually happened at the sentencing hearing.

Contrary to the previous finding made by the Court of Appeals, the sentencing hearing transcript reveals that not only did Petitioner's court-appointed defense attorney do nothing positive to represent the Petitioner at sentencing but that the attorney's representation was affirmatively harmful.

Trial counsel introduced no evidence in mitigation during Petitioner's sentencing hearing. Counsel's closing argument primarily consisted of a verbatim reading from a concurring opinion in Furman v. Georgia, where Justice Brennan argued that the death penalty is rarely carried out. In so doing counsel diminished the juror's sense of responsibility with regard to imposition of the death penalty. Counsel also never argued a single fact about Mr. Dobbs' background or about the offense in mitigation, never referred to Mr. Dobbs by name, and never asked the jury to return a sentence of life imprisonment. (RE-308, et seq., TTSC). In concluding his argument to the jury, trial counsel stated:

> I'm sure that all of you, in considering this man's sentence, will be judged by your conscience. I can only ask that in considering the punishment, that you inflict[6] one that you feel you can live with. (TTSC:8).

The sentencing hearing transcript establishes Petitioner's right to relief. Compare, Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991). In Horton, the death sentence was reversed based upon ineffective assistance of counsel where trial counsel introduced no evidence in mitigation, gave a closing argument which encouraged rather than discouraged the imposition of the death penalty, and where Horton proffered affidavits of persons who would have testified for him in mitigation at the penalty phase. All of these factors are in Petitioner's case if one reviews what actually occurred at Petitioner's sentencing hearing.

It is the integrity of the federal judicial process which is at stake in the instant case. The State's failure to produce the sentencing hearing transcript pursuant to Habeas Corpus Rule 5 and Petitioner's motion in District Court to supplement the record is a uniquely federal issue which should be addressed by the Court. The Court should not tolerate the fact that the lower courts were misled by the false affidavits submitted by the State. The Court should not allow previous opinions of the lower

[6] Inflict - To cause or carry out by physical assault or other aggressive action. The American Heritage Dictionary, Second College Edition, 1982.

federal courts to stand which were based upon testimony we know to be false.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A GEORGIA CAPITAL SENTENCING JURY MAY BE INFORMED THAT THEY HAVE "ABSOLUTE DISCRETION" TO IMPOSE THE DEATH PENALTY, THAT THERE ARE "NO STANDARDS" TO GUIDE THEM IN THEIR DECISION BETWEEN LIFE AND DEATH AND THAT THE "ONLY STANDARD, IF ANY" THAT THE JURY WOULD BE ALLOWED TO CONSIDER IS THE EXISTENCE OF A STATUTORY AGGRAVATING CIRCUMSTANCE.

The Court has consistently held that where discretion is afforded to a jury to determine between life and death, the jury must be guided by clear standards which focus the jury on the character of the defendant and the nature of the crime. Such discretion "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976), California v. Brown, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987), quoting Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976).

The jury instructions in this case utterly fail to satisfy this basic constitutional principle. This is particularly true in the present case because of the likelihood that racial prejudice would influence the jury's decision.

During the only portion of the jury instruction that dealt directly with sentencing on the murder charge the trial court gave the following instruction:

> Now I instruct you our law says in arriving at your verdict in these cases, beyond prescribing the limits which a jury can go, the law provides no standards for the guidance of the jury in the selection of the penalty but rather permits the whole matter of

> determining which penalty shall be fixed to the judgment, conscience, and absolute discretion of the jury.
>
> The only standard, if any, that you will be permitted to consider in arriving at whether or not you will inflict the death penalty is the question of whether or not you find beyond a reasonable doubt that this Defendant committed the offense of murder while engaged in the commission of another capital felony. (Emphasis added) (TT-513).

In the first paragraph the trial judge informed the jury that there are **"no standards"** for their guidance in selecting between life and death. This statement is a complete contravention of all Supreme Court jurisprudence.

In the same sentence the Court informs the jury that the law "permits the whole matter of determining which penalty to be fixed to the **judgment, conscience and absolute discretion** of the jury." Again, this instruction reiterates that there are no standards to guide the jury and could even be taken to mean that the worst prejudicial instincts could legitimately provide the basis for imposing the death penalty. There is no hint that the jury should consider the character of the Defendant, the nature of the crime or any perceived mitigating factors as a basis for choosing between life and death. There is no cautionary instruction to avoid the influence of passion, prejudice or other arbitrary factors.

The instructions conclude by telling the jurors that the **"only standard, if any,"** that they would be allowed to consider would be the existence of the statutory aggravating circumstance. For the third time the Court misled the jury and stated that the

only possible standard to guide the jury would be the existence of the statutory aggravating circumstance. Certainly, such an instruction improperly informed the jury that any mitigating circumstances they may find are not a legitimate basis for deciding upon a sentence. See, Gregg v. Georgia, supra, Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) and Morgan v. Illinois, ___ U.S. ___, 38 USLW 4541, 4543 (1992).

The entire rationale of Gregg v. Georgia, supra, is that the jury's discretion must be "controlled by clear and objective standards" which focus the jury on the circumstances of the offense and the character of the defendant. Id., at 197, 96 S.Ct. at 2936.

The United States Magistrate who initially considered this case recognized that a reasonable juror who heard the instructions in this case would not have been aware of his obligation to consider mitigating circumstances (Magistrate's Order, August 26, 1983, p. 56).

The result is that the jury in the present case was allowed to do exactly what the jury in Furman's case did: impose the death penalty without clear and objective standards for deciding between life and death. As in Furman, there is a very real possibility that the death sentence was influenced by passion and racial prejudice.

The Circuit Court's view that the jury instruction, as a whole, adequately limited the jury's discretion is inconsistent with this Court's jurisprudence. In the first instances, there

are no other instructions which would provide proper guidance to the jury. Assuming, arguendo, that something in these instructions pointed the jurors in the right direction, the Court has repeatedly stated that where there are two conflicting jury instructions, one of which is unconstitutional and "it is equally likely that the verdict...rested on an unconstitutional ground 'the jury decision would be reversed.'" Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316 (1990), citing Bachellar v. Maryland, 397 U.S. 564, 571, 90 S.Ct. 1312, 1316, 25 L.Ed.2d 570 (1970). See also, Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). Since it is highly likely that the jurors would believe that there were no standards for their guidance, or that the only standard for their guidance as between life and death was the existence of the statutory aggravating circumstance, the jury decision must be reversed.

Even if the jury instructions are merely "ambiguous" and subject to an erroneous interpretation, there still existed a "reasonable likelihood" that the jury would have applied the challenged instructions in a way that prevented it from consideration of relevant mitigating evidence or argument. See, Boyde v. California, supra, 110 S.Ct. 1198 and Estelle v. McGuire, ___ U.S. ___, 112 S.Ct. 475, 482, ___ L.Ed.2d ___ (1991).

As stated by the Magistrate:

> "A reasonable juror, upon receiving this instruction, would not have been aware of his obligation to consider mitigating

> circumstances in making his determination." (2:25, at p.56).

Petitioner further reiterates that given the extreme level of racial prejudice amongst the jury, court-appointed defense attorney and trial judge in this case, these jury instructions do not adequately protect Mr. Dobbs from the influence of passion, prejudice and other arbitrary factors.

Under the best of circumstances the Georgia death penalty scheme provides no systematic means for eliminating the effects of passion, prejudice and other arbitrary factors from the capital sentencing procedure, at the trial level. As noted in Zant v. Stephens, 462 U.S. 862, 871-72, 103 S.Ct. 2733, 2740, 77 L.Ed.2d 235 (1983), only the Georgia Supreme Court determines whether a death penalty "was imposed under the influence of passion, prejudice or any other arbitrary factors." See, also, Gregg v. Georgia, supra, 428 U.S. at 198, 96 S.Ct. at 2937.

Such a system breaks down where, as here, the Georgia Supreme Court reviews a cold, incomplete record which does not even include the penalty phase transcript. The influence of racism in the case could not be observed by the appellate court because of the court-appointed trial attorney's overt racism, which worked to screen the effect of racism in the case as a whole.

Further, where a jury is given extremely broad discretion to impose the death penalty it becomes even more important that the jury be guided by clear standards which properly direct and limit the jury's discretion.

In the present case the jury was given an incorrect jury instruction which altogether failed to guide the jury, which must have been understood to prohibit consideration of mitigating circumstances and which opened the door to passion and prejudice influencing the capital sentencing proceeding.

As stated in Gregg v. Georgia:

> When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations. 428 U.S. at 193, 96 S.Ct. at 2934.

IV. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY WHETHER IT IS ESSENTIAL THAT THE CAPITAL JURY MUST CONSIDER MITIGATING CIRCUMSTANCES OR WHETHER IT IS SUFFICIENT THAT THE JURY NOT BE PROHIBITED FROM CONSIDERING MITIGATING CIRCUMSTANCES.

This case presents the Court with an opportunity to explicitly state whether a capital sentencing jury must consider mitigating circumstances or whether the jury simply cannot be prohibited from considering mitigating circumstances. In a number of cases the Court has stated that a capital sentencing jury must consider mitigating circumstances. See, for example, Morgan v. Illinois, supra, 60 USLW at 4545-4546; Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). In Eddings the Court stated:

> ...neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence...
>
> The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration. 455 U.S. at 114-115, 102 S.Ct. at 876-877.

In other circumstances the Court has stated that a capital sentencing jury cannot be precluded from considering mitigating circumstances. Lockett v. Ohio, supra, Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) and Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976).

Applicable Georgia law, at the time of Petitioner's trial, stated that the judge "shall include in his instructions to the jury for it to consider, any mitigating circumstances..." (O.C.G.A. § 17-10-30(b)).

Petitioner suggests that in view of the extremely broad discretion granted to Georgia juries to decide between life and death, that it is imperative that juries be clearly directed that they must consider mitigating circumstances in every case.

This is the only manner in which the rationale of Gregg v. Georgia, supra, can be effectuated. In Gregg, the Court made the following statement about how Georgia sentencing scheme was supposed to work:

> No longer can a Georgia jury do as Furman's jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die. Instead, the jury's attention is directed to the specific circumstances of the crime:...In addition, the jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment (e.g. his youth, the extent of cooperation with the police, his emotional state at the time of the crime). (Footnote omitted) As a result, while some

> jury discretion still exists, "the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application." (Citation omitted). 428 U.S. at 197, 96 S.Ct. at 2936.

Instead of being told that there were "clear and objective standards" for their guidance, the jury in this case was told that there were "no standards" for their guidance.

Instead of being directed to consideration of mitigating circumstances this jury was told that the "only standard, if any" they would be allowed to consider was the existence of a statutory aggravating circumstance.

Instead of having its discretion suitably directed and limited, the jury in this case was told that the law "permits the whole matter of determining which penalty shall be fixed to the judgment, conscience, and absolute discretion of the jury."

In light of the jury instructions provided in the present case, this case presents an opportunity for the Court to clarify the requirement for jury instructions which clearly direct the jury to a mandatory consideration of mitigating circumstances.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: This 3rd day of August, 1992.

Respectfully submitted,

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ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

WILBURN DOBBS, Petitioner, v. WALTER D. ZANT, Respondent.	NO. 92 - October Term, 1992

PROOF OF SERVICE

I, MICHAEL KENNEDY MCINTYRE, hereby hereby declare, certify and attest as follows:

1. I have, pursuant to Supreme Court Rules 29.3 and 29.4, served the attached MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI and APPENDICES TO PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above-documents in the United States mail, properly addressed to each of them and with first class postage prepaid on this date.

2. The names and addresses of those served are as follows:

Ms. Mary Beth Westmoreland
Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W,
Atlanta, Georgia 30334

3. Pursuant to Title 28, U.S.C., Section 1746, I decalre, certify and attest under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: This 3rd day of August, 1992.

Michael Kennedy McIntyre